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Toward a More Enlightened Sentencing Procedure

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THE TASKS OF PENOLOGY:

A SYMPOSIUM ON PRISONS AND CORRECTIONAL LAW (PART II)

About 200 years have elapsed from the time of the classical principle of punishment, which equated each crime with an appropriate penalty established in advance by statute, to the more contemporary proposals of a sentencing tribunal, which divorces the judge from practically all responsibility or discretion with respect to the imposition of sentence. However, despite two centuries of discussion and experience, no general consensus has yet been reached on how the sentencing process can be individualized. Moreover, the question of how sanctions, penalties, or periods of treatment shall be determined continues to be the most persistent and perplexing problem in the entire field of criminal jurisprudence.

James V. Bennett

It is of little advantage to restrain the bad by punishment unless you render them good by discipline.

Pope Clement XI

TOWARD A MORE ENLIGHTENED SENTENCING PROCEDURE

Theodore Levin*

The inequities of sentences for criminal offenders present one of the great problems in the administration of criminal justice. The impact of an individual judge's background, personality, and prejudices on the sentences which he pronounces has increasingly become a matter of legitimate public concern.

In November 1960, the judges of the United States District Court for the Eastern District of Michigan instituted new sentencing procedures. These require the sentencing judge to discuss proposed sentences with other members of his court prior to sentencing. Although our practice has been refined during the past five years, we have enthusiastically adhered to its fundamental concept. Some other courts have adopted our practice, finding it an important first step in the equalization of justice in criminal cases.

I suggested in an article during my earlier years on the bench that in a future, more enlightened time, a court's only function would be the determination of innocence or guilt and a board composed of persons trained and experienced in the problems of criminology would determine the nature and duration of corrective treatment.[1]

Pending the arrival of that more enlightened age, we are attempting to eliminate the disparities in the sentences meted out by different judges and, not infrequently, by the same judge. We strive not to achieve uniform sentences but to acquire a uniform philosophy which includes the ingredients that lead to a sentence—one in keeping with enlightened social and legal policy.

A just sentence will reflect the divergent backgrounds and present circumstances of each individual offender, his present attitudes, and the nature of the offending act itself. Judges, years ago, often had no alternatives to the imposition of blind, so-called "straight," sentences. Years of effort on the part of lawyers, judges, and other interested persons have effected departures from concepts of punishment unrelated even to the public welfare, let alone the welfare of individual offenders. Public policy, in recent years, has increasingly emphasized those factors most likely

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1 Levin, *Sentencing the Criminal Offender*, Fed. Prob., March 1949, p. 3.

to fashion a sentence to serve and protect the public and, where possible, to develop the offender into a useful citizen.

Congress took one of the first steps by enacting the Probation Act in 1925, providing for the suspension of sentence and for placing offenders on probation.[2]

In 1938 Congress enacted the Juvenile Delinquency Act, which applies to all offenders under the age of eighteen with minor exceptions.[3] Under this act, the proceeding is not deemed a criminal prosecution. Probation or commitment may be imposed for a period not exceeding minority, and parole eligibility lies within the sole discretion of the parole board.

Congress enacted the Youth Corrections Act in 1950, which, as amended, enables judges to commit any offender under twenty-six to special youth correction facilities.[4] That act established a youth correction division within the United States Board of Parole, empowering that division to release offenders under twenty-six at any time. However, the provision in that act enabling a court, under certain circumstances, to set aside the convictions of such offenders, has been diluted by the practice of the Federal Bureau of Investigation of keeping a record of all such convictions even after they have been set aside.

In 1958 Congress enacted an indeterminate sentence law which permits a judge to sentence a defendant for the maximum term with eligibility for parole at any time or to impose a minimum sentence of not more than one-third of the maximum, after which the defendant is eligible for parole.[5]

The 1958 act also enables a judge to issue "split sentences" in which the offender is sentenced to imprisonment for a definite term; the execution of that sentence is suspended except for a stated first portion not to exceed six months, and the defendant is placed on probation for the remaining portion.

The act of 1958 also empowers judges to commit a defendant for "observation and study" under either the adult or youth correction statutes, enabling the Bureau of Prisons to perform psy-

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[2] Probation Act, ch. 521, 43 Stat. 1259 (1925) as amended, 18 U.S.C. § 3651-56 (1964).

[3] Juvenile Delinquency Act, ch. 486, 52 Stat. 765 (1938), as amended, 18 U.S.C. § 5031-37 (1964).

[4] Federal Youth Corrections Act, ch. 1115, 64 Stat. 1086 (1950), as amended, 18 U.S.C. § 5005-26 (1964). For offenders between twenty-two and twenty-six years of age see 18 U.S.C. § 4209 (1964).

[5] 18 U.S.C. § 4208 (1964).

chological, psychiatric, and other diagnostic examinations designed to aid the judge in his final disposition of the case.

Thus, with the exception of offenses punishable by death or life imprisonment and the mandatory sentences provided for certain narcotic offenders, judges now have a number of tools for arriving at effective sentencing. However, judges still have few guidelines for the intelligent employment of these tools. Unfortunately, the appointment of a lawyer to a federal judgeship by the President of the United States, even with the advice and consent of the Senate, does not provide the appointee any more wisdom than he previously possessed.

Considering the heterogeneous complexion of a court in any metropolitan area and the varying environmental influences that have shaped the minds of its several judges, we can appreciate the wide variety of legitimately divergent perspectives they could necessarily bring to bear upon any matter requiring social judgments.

Let us take a look at the background of the members of our court. All of us had experience in the general practice of law. Two were United States Attorneys. One was a county prosecuting attorney. Another was a municipal judge and later a distinguished member of the United States House of Representatives. Another was Chairman of the State Compensation Commission, a trustee of his university, and later a member of the highest nisi prius state court. Another was a law professor, a member of the State Corrections Commission and later a justice of the state Supreme Court. Another was the state attorney general and later a judge of the highest nisi prius state court. Some members are Catholic, some Protestant, and I am a Jew. One of our members is a Negro. Three of my colleagues have American-born ancestors going back many generations; two were born abroad; and the others, including myself, are the sons of immigrants.

In my own case, my limited experience in criminal work appalled me when I became a judge, and soon after taking the bench I realized that it was helpful to exchange views with my colleagues and our then Chief Probation Officer in the consideration of an appropriate disposition of a criminal case on sentence. We were fortunate to have as Chief Probation Officer Richard F. Doyle, who possessed a deep understanding of the wide variety of conflicting forces that motivate human beings. At one of my earliest meetings with Mr. Doyle we discussed how some judges come to be regarded as "tough" and others as "lenient," though all of them were equally honest and conscientious. As we talked

we once recalled the well-known tale in which each of six blind men, depending upon which part of the elephant he had touched, had a different idea of what an elephant was like.

Obviously, a judge acquires little first-hand knowledge of the individuals who appear before him for sentence. Not only in the great majority of cases where the defendant pleads guilty but also in those cases where the judge looks into the eyes of the defendant during the trial, the judge really knows very little about the offender until his general background is investigated, disclosed, and studied.

James V. Bennett, a lawyer, social scientist, and for many years the Director of the Federal Bureau of Prisons, saw the impact of the frightening disparity in sentences likely to result from the natural differences between judges' experiences and backgrounds. He and certain judges instituted a general movement to provide federal judges with an opportunity to exchange views with their colleagues.

Upon the recommendation of the Judicial Conference of the United States, the Honorable Emanuel Celler, Chairman of the House Judiciary Committee, led the movement in Congress in 1958 for the enactment of a law providing for sentencing institutes for federal judges. The first of such institutes was held in 1959 under the chairmanship of Chief Judge Campbell of the Northern District of Illinois for two days of a one-week seminar conducted by Chief Judge Alfred P. Murrah, of the United States Court of Appeals for the Tenth Circuit. The federal judicial circuits have subsequently held such institutes either individually or with one or more other circuits.[6] These two or three-day sessions have been well attended by the judges.

Part of the program of these institutes consists of workshops where the judges are divided into groups and discuss cases taken from actual presentence reports on a nationwide basis. These cases highlight the alternatives now available to judges in sentencing individuals. Penologists, psychiatrists, and other experts have also attended and have made important contributions to these sessions.

Although, because of the pressure of the business of the courts and the expense involved, these institutes are held only at intervals of two or three years, I hope they will continue, because they provide judges with a much needed opportunity for that broaden-

[6] Youngdahl, *Development and Accomplishments of Sentencing Institutes in the Federal Judicial System*, 45 NEB. L. REV. 513 (1966) *infra* this volume.

ing enlightenment that so frequently results from an exchange of views and experiences between mature and concerned human beings.

Certainly the institutes establish some general standards, but no institute has ever had the opportunity of discussing more than thirty or thirty-five cases. The approach to sentencing in this situation is therefore limited essentially to the development of general principles.

At the level of the individual trial court, however, the same process can reap enormous practical results. The judges of the United States District Court for the Eastern District of Michigan have created what we refer to as our "Sentencing Council," the previously mentioned procedure requiring the members of our court to meet and exchange views on their pending sentences.

A Sentencing Council converts into a positive advantage and capitalizes on the diversity of experience by drawing upon and pooling the judges' varying backgrounds to arrive at a more intelligent, informed sentence than would ordinarily result if each judge relied solely upon his own experience and attitude. Sentencing is an educational process never completed. In the Council, each judge is both teacher and student.

While the Council provides the opportunity to develop collective wisdom, it must be stressed that its deliberations do not result in a collective sentence. The judge before whom the case is pending does not avoid his sole responsibility for the sentence eventually imposed. The views of the other judges, though influential, are advisory only, but every criminal case in the Eastern District of Michigan is presented to the Council before sentence is imposed.

Originally, all of the six judges then on our court met as the "Sentencing Council" in the chambers of the Chief Judge in the late afternoon on Mondays as often as the judges accumulated a number of cases for disposition. As the caseload in the District grew and the number of judges increased from six to eight, we found it impractical to convene the entire bench. The Council currently meets in panels of three judges on any mutually convenient morning between nine and ten o'clock. It is most unusual for a session to exceed one hour.

The Chief Probation Officer requests three judges to convene such a Council whenever his department has completed a sufficient number of presentence reports for those three judges. The membership of the panels constantly shifts, so that each judge is

exposed to the views of every other judge. Normally, from twelve to eighteen cases are considered at each session. The meetings are held in the chambers of the senior member of the panel, who also presides over the session.

Each judge on the panel receives, a few days in advance, a copy of all the presentence reports to be considered at the session. Such a report is essential to an informed sentence, and the judges could not discuss a case meaningfully without one. Each report is written by one of the fifteen probation officers, approved by one of the two supervisors, and then approved by the Chief Probation Officer or his Chief Deputy. Two or more members of the probation office, including the Chief Probation Officer or his Chief Deputy, attend each Sentencing Council meeting. Since the reports are prepared by numerous persons, the attending officers would not have prepared all the cases before the Council for discussion.

The presentence report contains all the information considered necessary for the proper disposition of the case. This includes the defendant's own statement, the letters in behalf of the defendant, or a reference to them, and a complete report of the defendant's family background, of his home and neighborhood, his education, religion, interests and activities, of his physical and mental health, employment record, military history, and any prior record with federal, state, and local authorities. The report also outlines the offense, the evidence, any mitigating or aggravating factors, and the defendant's apparent attitudes. It concludes with a general recommendation as to the kind of sentence—imprisonment, fine, and/or probation. When the probation officer believes diagnostic tests are necessary for a proper disposition of the case, he recommends commitment for observation and study.

After each member of the panel has studied the presentence report, he fills out a "Sentencing Council Recommendation Chart." This chart (a copy of which is set out in Appendix A) includes sections for the recommended disposition and the reasons supporting it.

The meetings themselves are quite informal. The discussion of each case is begun by the sentencing judge, who states his recommended disposition along with the factors he considers decisive. The other two advisory judges then state their recommended dispositions and the factors they consider decisive. Many of the cases are handled quickly. There is usually no discussion where there is agreement or an expressed divergence of a month or two. It is when there is significant disagreement that the judges begin the Council's most important and useful business.

We have our differences, of course, but we always meet in a fraternal spirit; the meetings never end without a feeling on the part of all, frequently expressed, that it is heartwarming and helpful to get together and discuss our common problems in an effort to reach some consensus on the needs of our society and the needs of the offender.

Our Sentencing Council has considered the disposition of over 3,000 cases at 215 meetings during its first five years of operation. An evaluation of the Council now seems appropriate. Has it eliminated or greatly reduced disparity in sentencing? Has it produced more intelligent, better informed sentencing?

The Council has tended to induce in the sentencing judge more objective and principled attitudes. His awareness that he must expose his thinking to the critical gaze of his colleagues persuades him to examine his own prejudices and motivations underlying his conclusions.

We have found that the Council tends to create consensus among the judges on which factors are most relevant in sentencing and the weight to be accorded to each of them. The present form of the recommendation chart is much more simple than prior forms as the judges deleted some factors which they learned were rarely decisive. The factors presently considered most significant are the offender's prior record, family responsibility, work record, the likelihood that the defendant will respond to probation, and whether custody is required for either rehabilitation or for the protection of the public.

We are getting closer in the development of a uniform philosophy. The meetings consume less time now than they did five years ago. The range of the varying recommendations has become increasingly narrow. We have particularly experienced a substantial decrease in the frequency with which the Council is confronted by disagreement about the type, rather than the quantum, of the sentence. For example, during the Council's second year, there were sixty-five cases in which one panel member suggested custody and at least one panel member suggested probation. During the Council's fifth year, there were only about twenty-five cases in which the judges disagreed, even initially, on whether custody or probation was the proper sentence.

In addition to fostering more agreement among the judges acting independently prior to their meetings, the Council has a significant impact on the sentences finally imposed by the sentencing judge in the case where the judges initially disagreed. The table set out in Appendix B, which indicates the number of times the

final disposition of the sentencing judge was different from his recommended disposition, demonstrates the Council's pervasive impact. In approximately one out of every three cases each year the sentencing judge, during or after the meeting, reached a different conclusion from the one he had proposed at the beginning of the discussion. These instances of change include all eight members of the court, indicating that each judge has been receptive to the opinions of his colleagues.

The table also shows that the impact of the Council is not limited to any particular kind or degree of sentence. The judges have been willing to change from custody to probation and from probation to custody. Probation and fines have been both decreased and increased. The length of custody, a cause of considerable disparity, has been both decreased and increased in a large number of cases as the sentencing judge looks to the Council for guidance in this difficult area. These changes in the length of custody in many instances concerned several years, not just a few months.

The Council is particularly effective when the recommendation of the sentencing judge is significantly different from both advisory judges. For example, in its fifth year a sentencing judge in twenty-seven cases recommended a term of custody at least six months less than both advisory judges recommended. In eighteen, or two-thirds, of these cases, the sentencing judge increased his final disposition to conform more closely to the views of his colleagues. In the twenty cases during its fifth year in which the sentencing judge recommended a longer term of custody by at least six months than both advisory judges recommended, the sentencing judge reduced his final disposition in eleven cases, or fifty-five per cent. In the cases where the difference between the recommendations of the sentencing and advisory judges was at least two years, the percentage of cases in which change occurred was considerably higher. In each of the four cases in the fifth year in which the recommendation of the sentencing judge differed in type from that of both advisory judges, the sentencing judge imposed the type of sentence recommended by the advisory judges.

Divergent analyses of the particular defendant's character and potential for rehabilitation provide, of course, a primary source of disagreement on the sentences to be imposed. The discussions in the Council promote a more accurate appraisal of the defendant. For example, the sentencing judge may not have sufficiently appreciated the defendant's assaultive nature or his unwitting association with co-defendants whose culpability is greater and whose criminal tendencies are more severe. If the panel is still

not satisfied after the discussion that they understand the defendant's motivations, the matter may be referred back to the probation department for further investigation and report.

Occasionally the panel, after discussing a case, decided that the proper sentence is something totally different from what anyone recommended initially. This occurred no fewer than eight times last year. On more than one occasion all the judges constituting the panel were of the opinion upon entering the meeting that an institutional sentence would be appropriate but after full discussion, they all agreed that the defendant should be placed on probation. I know of no instance where any of these defendants have violated the terms of their probation.

The Council has tended to produce sentences more closely conforming to modern correctional theory. Prison terms in general are shorter. For example, the table shows that the term of custody decreased twice as often as it was increased in the third and fourth years of the Council. As a result, the sentencing judges tended to recommend lower terms at the beginning of the discussions so that in the fifth year the term of custody was increased as often as it was decreased.

Incidentally, except in those cases where a mandatory sentence is required by law, our court imposes all prison terms of eighteen months or more under section 4208(a)2,[7] which permits the Board of Parole to release the offender whenever it sees fit. Our court commits a higher percentage of defendants under this section than any other district court in the country.

Most criminologists advocate more extensive use of probation as the most effective, as well as the least expensive, method of rehabilitation. The Council has resulted in more defendants being placed on probation. The factors justifying probation are likely to be more thoroughly explored when three judges discuss a case than when one judge contemplates them alone. As a result, the percentage of offenders placed on probation in our district has progressively increased from forty-five per cent five years ago to sixty per cent today. Yet the percentage of probation violators has not increased.

In place of prison terms, the judges in our district are increasingly substituting other methods for deterrence. The number of fines has increased. Special conditions to probation are more prevalent. Split sentences are more frequently imposed.

[7] 18 U.S.C. § 4208 (1964). For discussion see text accompanying note 5, *supra*.

The Sentencing Council has established greater co-operation between the judges and the probation department. We have always enjoyed a good relationship with our probation department, but the Council has afforded the judges an opportunity to know the members of the staff individually and to benefit from their views. The contributions of the probation staff at Council meetings in many difficult cases have helped the judges considerably. Similarly, the probation staff has benefitted by its attendance at Council meetings and by observing firsthand the sentencing philosophies of the judges, the factors considered by the judges to be most important, and the degree to which the judges rely on their work product. As a result, the probation staff has improved its presentence investigations and reports by including additional data the judges find significant and by shortening or even eliminating their discussion of factors the judges believe to be relatively unimportant.

Finally, the Council has proved to be particularly important for newly appointed judges. The Council has imparted to such judges, in a much shorter time than would otherwise be possible, a developed knowledge of the several statutory sentencing alternatives as well as some of the factors involved in their application.

The Council is an ambitious and successful project. But, like all things, it has important limitations. It cannot eradicate all disparity in sentencing. Since each judge retains his individual authority, he may ignore his colleagues' suggestions whenever he feels justified in doing so. Also, a Council such as ours obviously promotes consistency only within a single judicial district. For greater inter-district consistency we must still rely on an interchange of ideas at Sentencing Institutes, on law reviews, and on publications such as *Federal Probation.* Such a Council would work with greater difficulty in non-urban areas where the judges are geographically separated from one another, and it would be an intolerably time consuming approach for many state and municipal courts handling an enormous volume of misdemeanor cases.

However, the Sentencing Council can be useful in many courts in the handling of major criminal sentencing and has been adopted elsewhere as information about our procedure has spread. The Eastern District of New York (Brooklyn) instituted a Sentencing Council in January 1962. It is similar to the Council in Detroit. All eight judges of that court participate in panels of three with rotating membership, and after all panel members have received a copy of the presentence report they discuss every prospective sentence before the final disposition.

The Northern District of Illinois (Chicago) adopted in December 1963 a Sentencing Council procedure also similar to our procedure in Detroit. Their Council consists of two voluntary panels, each with five permanent members. Panel I meets every Monday afternoon to discuss the cases up for disposition that week before the panel members. Panel II meets less frequently and operates on a more selective basis, considering those convicted of certain specific offenses such as income tax violations and embezzlement.

Chief Judge Zavatt in Brooklyn and Chief Judge Campbell in Chicago and their colleagues are enthusiastic and pleased about the operation of their Councils and their results. Statistics are also maintained by the Council of the Northern District of Illinois. They indicate an influence on the sentencing judge strikingly similar to our experience.

The adoption of a sentencing council procedure is also being presently considered by other courts as well. For example, a Sentencing Institute of the Ninth Circuit held in the fall of 1964 passed a resolution calling for the employment of such sentencing councils wherever feasible.

As a direct result of our Sentencing Council, the sentence any defendant receives in the federal courthouse in Detroit depends must less than it did on the courtroom in which he happens by chance to find himself. Regardless of the courtroom he enters, the defendant is more likely to receive a sentence which conforms to the goals of correctional theory, for the sentencing council does not merely reduce disparity or inequitable treatment; it also tends to raise the quality of all sentencing.

Courts, in the sentencing of convicted persons, must be something other than mechanical instruments of punishment. The symbolic blindfold on the statue of Justice was never intended to obscure from the sight of the judge an understanding of the human being who stands before him awaiting judgment. The quality of sentencing must concern us no less than the quality of the entire judicial process which precedes it.

APPENDIX A

SENTENCING COUNCIL RECOMMENDATION CHART

JUDGE _____ DOCKET NO. _____

DEFENDANT _____ AGE _____ MARRIED _____ DEPENDENTS _____

OFFENSE _____

I. SUGGESTED DISPOSITION BY JUDGE _____

A. Probation _____ Length _____ years 5010(a) _____
Special Condition _____

B. Fine $_____ If special condition of probation check ( )

C. Custody: period of _____ 4208(a) (1) _____ 4208(a) (2) _____
Y. C. A. _____ F. J. D. A. _____

D. Split Sentence _____

E. Study and Report: 4208(b) _____ 5010(e) _____ Sec. 5034_____

II. REASONS FOR PROBATION:

A. ( ) Prior record: None _____ Minor _____ Serious _____ Serious but no violation of an aggravated nature for past _____ years.

B. ( ) Family responsibility _____

C. ( ) Good work record _____

D. ( ) Present attitude _____

E. ( ) Other (comment) _____

_____

III. REASONS FOR CUSTODY:

A. ( ) Nature of offense _____

B. ( ) Prior record: Serious _____ Minor but continuous _____

C. ( ) Comment _____

D. ( ) Failure to assume family responsibility _____

E. ( ) Poor work record _____

F. ( ) Lack of adequate plan to insure even minimum response to probationary treatment _____

G. ( ) Other (comment) _____

_____

DATE _____ SIGNED _____
United States District Judge

APPENDIX B

TABLE

SUMMARY OF DISPOSITION BY SENTENCING JUDGE

	NUMBER OF CASES				
	1st yr.	2d yr.	3d yr.	4th yr.	5th yr.
No Change From Recommended Sentence To Final Sentence:	**325**	**368**	**416**	**473**	**330**
Changes:	**164**	**154**	**172**	**220**	**187**
Custody increased	47	38	31	30	37
Custody decreased	51	39	62	80	34
Custody to Youth Corrections Act	2	0	2	1	2
Custody or Youth Corrections Act to probation	9	26	20	30	14
Custody or Youth Corrections Act to Observation and Study	12	7	6	1	3
Other custody changes	0	0	0	0	7[1]
Probation increased	1	9	7	7	17
Probation decreased	4	3	8	6	7
Probation to custody	6	6	10	10[2]	5[3]
Probation to fine and probation	10[4]	0	12	25	2[5]
Split sentence to probation only	0	0	0	2	1
Probation to Observation and Study	1	1	0	0	1
Probation to split sentence	0	0	0	0	6
Fine increased or decreased	9	14	8	18	44
Fine to custody	3[6]	0	0	2[7]	0
Fine to probation	4	0	0	1	3[8]
Fine to fine and probation	1	10	0	0	0
Fine and probation to fine	1	0	0	5	1
Other fine changes	0	0	2[9]	0	0
Observation and Study to custody	2	0	3	0	3
Observation and Study to probation	1	1	1	2	0

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1 Includes Youth Corrections Act to custody (2); Custody to split sentence (4); Custody to probation and fine (1).

2 Includes probation to Youth Corrections Act (1).

3 Includes Split Sentence to custody (1).

4 Includes probation to fine only (2).

5 Includes probation to fine only (1).

6 Includes fine and probation to custody (1).

7 Includes fine and probation to custody (1); fine to custody and fine (1).

8 Includes fine and probation to probation (3).

9 Includes fine and custody to split sentence (1); fine and probation to split sentence (1)

Miscellaneous:	**61**	**60**	**54**	**66**	**55**
No recommended disposition by sentencing judge on file	54	40	27	40	36
Disposition pending at time of annual audit	7	18	18	15	13
Dismissed	0	1	9	9	6
Deceased	0	1	0	2	0
Total Cases:	**550**	**582**	**642**	**759**	**572**